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November 22, 1993

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


Re: Review of the Pioneer's Preference Rules
ET Docket No. 93-266

Dear Mr. Caton:

On behalf of Suite 12 Group ("Suite 12"), enclosed please find an original and nine (9) copies of its Reply Comments filed in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Charles R. Milkis
Counsel for Suite 12 Group

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Review of the Pioneer's
Preference Rules

ET Docket No. 93-266

To the Commission

REPLY COMMENTS OF SUITE 12 GROUP

November 22, 1993

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To: The Commission

REPLY COMMENTS OF SUITE 12 GROUP

Suite 12 Group ("Suite 12"), by its attorneys, hereby files Reply
Comments in the above-referenced proceeding.

I. BACKGROUND

Suite 12 is an entrepreneurial inventor who since 1986 has invested many
millions of dollars to develop a revolutionary wireless cellular technology,
CellularVision, which is now capable of offering consumers an array of
multimedia services in a high quality yet cost efficient manner in the fallow 28
GHz spectrum band. In January 1993, in response to a Petition for Rulemaking
and a Petition for Pioneer's Preference filed by Suite 12, the Commission
released a Notice of Proposed Rulemaking which proposed to reallocate the 28
GHz band for Local Multipoint Distribution Service ("LMDS").¹

In the LMDS NPRM, the Commission tentatively concluded that Suite
12 should be awarded a pioneer's preference, appropriately recognizing Suite

¹ See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, ("LMDS NPRM"), 8 FCC Rcd 557 (1993).

12's singular pioneering role in developing the CellularVision technology for LMDS. Solely due to the tenacious, high risk commitment of resources and the vision of the founders of the CellularVision system, consumers throughout the United States should, in the near future, receive a high quality, low cost alternative to cable television and other data and voice services. However, with the Commission's sudden reexamination of the pioneer's preference rules, Suite 12 faces the real risk of losing the governmental incentive upon which it has relied in committing substantial resources towards the development of its viable, innovative new technology. As discussed below, the arguments presented by Suite 12 in its Comments are consistent with the reasoned positions advanced by the majority of commenters in this proceeding.

II. ARGUMENT

Suite 12 reiterates that the pioneer's preference rules, coupled with the highest degree of human creativity and ingenuity, serve an important public interest and should be maintained. The pioneer's preference rules, by rewarding innovators of new technologies or services with licenses, encourage U.S.-based entrepreneurs and inventors to commit the substantial energy and resources necessary to develop new technologies and services which ultimately benefit consumers. The extent of such commitments in reliance on the pioneer's preference rules is evidenced by a number of commenters.²

² See Comments of Corporate Technology Partners; American Personal Communications; Advanced MobileComm Technologies, Inc.; Digital Spread Spectrum Technologies, Inc.; CELSAT, Inc.; Cox Enterprises, Inc.; Motorola Satellite Communications, Inc.; Advanced Cordless Technologies, Inc.;

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which authorizes the Commission to issue licenses by competitive bidding when certain criteria are met, in no way alters the Commission's ability to award pioneer's preference licenses,³ nor does it mandate or even suggest that the Commission should require payment for such licenses.⁴ The few commenters who argue that the language of the Budget Act somehow provides the Commission with the legislative support to eliminate the pioneer's preference rules are misguided.⁵ The Conference Report states that the Conference Agreement adopted three provisions from a Senate amendment, "including the provision of Section 309(j)(5)(E) concerning the so called 'Pioneer's Preference.'" See H.R. Rep. No. 213, 103rd Cong., 1st Sess. at 485 (1993).⁶ The incorporation of this language in the Budget Act explicitly overrides and eliminates any suggestion of "neutrality" towards the pioneer's preference rules attributed to the House of

Omnipoint Communications, Inc.; and Satellite CD Radio, Inc.

³ See 47 U.S.C. § 309(j)(6)(G) (the competitive bidding provisions do not "prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.").

⁴ See 47 U.S.C. § 309(j)(7)(B) (in designing competitive bidding schemes, the Commission may not base a public interest finding "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding.").

⁵ See Comments of PageMart, Inc.; GTE Service Corporation; Paging Network, Inc.; Bell South; and Southwestern Bell Corporation.

⁶ Section 309(j)(5)(E) of the Senate amendment became Section 309(j)(6)(G) of the Communications Act.

Representatives; moreover, the statutory language implicitly requires the Commission to consider more than simply the goal of achieving federal revenues from spectrum auctions in determining, in the present case, whether the advent of spectrum auctions obviates the need for the pioneer's preference rules.

Contrary to the suggestion of some commenters, the pioneer's preference rules and the competitive bidding provisions of the Budget Act are separate and distinct.⁷ The competitive bidding scheme was designed by Congress to generate revenue for the Federal treasury in the spectrum licensing process. See H.R. Rep. No. 103-11, 103d Cong., 1st Sess. at 259 (1993). By contrast, the pioneer's preference rules were designed for the wholly independent but equally laudable public policy goal of providing an important incentive to innovators to develop new technologies and services and to assure their expedited availability to U.S. consumers by eliminating the delays and risks associated with the licensing process. See Suite 12 Comments, at pages 7-8. Moreover, as Suite 12 explained, an auction scheme will not necessarily guarantee that an innovator worthy of a pioneer's preference will in fact receive a license. See Id., at pages 12-13, note 12. Thus, the advent of competitive bidding does not eliminate the important role of the pioneer's preference rules.

Furthermore, by subjecting pioneers to auctions, or by requiring some form of payment for pioneer's preference licenses, the Commission will frustrate the important public policy role of the pioneer's preference rules as a regulatory

⁷ See Comments of Nextel Communications, Inc.; GTE Service Corporation; PageMart, Inc.; and Nynex Corporation.

catalyst for the rapid development and deployment of new technologies and services to the American public. The development of a technological innovation typically involves a substantial and high risk commitment of millions of dollars. If a pioneer's preference recipient has to compete at an auction to obtain a license, the incentive to develop innovations provided by the pioneer's preference rules will be eliminated since competitors who lack the capital constraints of the innovator, such as well-financed cable companies and telcos, could easily acquire licenses, without the high risk and investment of the pioneer, by submitting the highest bid at the auction.

For smaller entrepreneurial inventors like Suite 12, who are the proven well-spring of communications innovations,⁸ the acquisition of a license may often provide the only means to recoup their large up-front research and development costs. However, such entities, already burdened by such substantial expenditures, typically would lack the additional capital required to pay for a license or compete successfully for a license at an auction against established spectrum users like cable companies and telcos.⁹ Accordingly, the awarding of a "free" license under the current pioneer's preference rules is essential, as the rules serve the important purpose of fueling technological innovations by smaller

⁸ See generally Report of The Small Business Advisory Committee To The Federal Communications Commission Regarding Gen. Docket 90-314, September 15, 1993 ("SBA Report"), discussed below.

⁹ Furthermore, as Suite 12 noted in its Comments, at page 13, the acquisition of financial support necessary to allow a small innovator to make a competitive bid will necessarily involve the relinquishment of substantial ownership and control over the innovation.

entities.

Amazingly, some commenters have argued that pioneer's preference awardees should have to pay for their licenses in order to offset what they claim are the "inequities" or "enormous cost structure disparities" that will result from the award of pioneer's preference licenses.¹⁰ While the value conferred by the Commission's grant of a pioneer's preference license is significant, in no case should it be viewed as providing an anti-competitive "headstart" to a small, tenacious entrepreneurial innovator like Suite 12, who has already spent millions of dollars in research and development and continues to spend significant additional resources in order to provide the U.S. consumer public for the first time with truly innovative high quality, low cost video, voice and data services.¹¹ Appropriately, the award of a pioneer's preference license merely seeks to provide recognition and support for the years of commitment and substantial expenditures which a pioneer such as Suite 12 has undertaken in order to bring a new technology and service to the consumer marketplace.

Moreover, the few commenters who claim that the award of pioneer's preference licenses will disrupt the cost structure and balance of the marketplace need only look to the PCS license scheme, where three pioneer's preferences have been granted in a service with about 2,500 possible licenses. See Cox

¹⁰ See Comments of PageMart, Inc. and Paging Network, Inc.

¹¹ With the increasing number of telco-cable mergers, the CellularVision technology for LMDS may represent the only natural competitor in the provision of these services.

Comments, at page 11. Clearly, the impact of pioneer's preference grants on a particular service and on the competitive marketplace are positive, and the grant of one pioneer's preference can hardly be viewed as disruptive to the hundreds of potential competitors in a new service like LMDS -- competitors who would not be seeking to enter the LMDS marketplace were it not for the accomplishments of a pioneer like Suite 12.¹²

Importantly, the FCC's Small Business Advisory Committee ("SBAC") has concluded that the majority of technological innovations in recent years are attributable to small entities.¹³ This leading role of small entities in forging technological innovations, and the consensus among the commenters that the pioneer's preference rules provide a tangible incentive for entities to seek to develop technological innovations, are crucial factors that should govern the outcome of this proceeding. If the pioneer's preference rules either are eliminated, or amended to require payment for pioneer's preference licenses, the evidence compiled by the Commission suggests that the vital group of small entities responsible for the majority of the technological innovations in recent years will be discouraged from committing the substantial energy and resources

¹² Suite 12, having developed a new, innovative technology and service, is the only and uncontested recipient of a tentative pioneer's preference for LMDS. This differs importantly from PCS, where a number of pioneer's preference applicants provided innovations to the existing cellular technology.

¹³ See SBA Report, at page 5 (Noting that "many technological advances in recent years have been introduced by small firms and new entrants," that "55% of all technological innovations are attributed to firms with less than 500 employees," and that "small firms innovate at a per person rate twice that of large firms, [and] spend more on research and development. . .").

in the first place, ultimately stunting the development of new technologies.

The U.S. Small Business Administration ("SBA"), a separate federal agency explicitly charged with promoting competition through viable small businesses, filed Comments in this proceeding warning that repeal or substantial changes to the pioneer's preference rules "may have a significant adverse impact upon a substantial number of small entities." See Comments of the Chief Counsel for Advocacy of the United States Small Business Administration ("SBA Comments"), at page 2. The SBA observed that the Commission is "overly concerned" with the impact of pioneer's preferences on competitive bidding, rather than on the public policy benefits of the pioneer's preference rules. Id. The SBA also expressed concern that the majority of parties that petitioned the Commission to reexamine the pioneer's preference rules "are all large businesses with access to substantial amounts of capital and would benefit dramatically from forcing smaller businesses with pioneer's preferences to relinquish them and enter an auction." Id., at footnote 2.

Finally, Suite 12 reiterates its position that if the Commission decides to eliminate or alter significantly the pioneer's preference rules, such changes cannot be applied retroactively to the tentative grants made in several proceedings, including the grant to Suite 12 in the LMDS proceeding.¹⁴ Any attempt to eliminate or alter the pioneer's preference rules, except on a

¹⁴ As Suite 12 argued in its Comments (at page 16, note 14), there is no sound basis for treating the four tentative grants any differently than the two permanent grants the Commission has made, and which it proposed to grandfather from any changes adopted in the instant proceeding.

prospective basis, will constitute a legally unsound and reversible action, reneging on a Congressionally-supported Commission pledge to reward those who in reliance on the pioneer's preference rules have committed substantial resources to develop new technologies and services for the U.S. public.

As Suite 12 demonstrated in its Comments, the injustice and harm that would be forced upon Suite 12 and others by retroactive application of changes to the pioneer's preference rules clearly outweighs any possible governmental interest that supports denying parties the benefit of the rules on which they have reasonably relied, to their detriment. See Suite 12 Comments, at pages 15-19. Similarly, the SBA opposes the retroactive application of any changes in the pioneer's preference rules to entities that have currently obtained preferences, or to those that are currently seeking preferences, agreeing with Commissioner Barrett "that the Commission should not at this late stage abandon the pioneer's preference for those entities that have taken the initiative in developing new technologies and services." See SBA Comments, at page 2 .

In order to justify the retroactive application of a change in the pioneer's preference rules, the Commission must have a statutory basis for such action. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). In the present case, there is no such statutory basis for retroactivity. To the contrary, both the Budget Act and the Communications Act reflect a clear legislative preference for the promotion of new technologies and services. In the Budget Act, Congress has mandated that the Commission promote the rapid deployment of new technologies and services to the public without administrative delay. See

47 U.S.C. § 309(j)(3). Likewise, Section 7 of the Communications Act codifies a governmental policy to encourage the provision of new technologies and services. See 47 U.S.C. § 157. The pioneer's preference rules clearly encourage the rapid development and deployment of new technologies by providing U.S. inventors with a tangible reward for their pioneering efforts.

III. Conclusion

Based on the foregoing, Suite 12 Group reiterates its views and those of the overwhelming majority of commenters in this proceeding, that the pioneer's preference rules serve an important public purpose and should not be altered. However, if the Commission does eliminate or change the pioneer's preference rules, Suite 12 reaffirms its strong opposition to the retroactive application of any changes of the rules to the six entities that have been awarded permanent and tentative pioneer's preferences.

Respectfully submitted,

Suite 12 Group

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